

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

ARTHUR JEMISON,

Defendant-Appellant.

Supreme Court No. _____

Court of Appeals No. 334024

Circuit Court No. 15-10216-01

NOTICE OF FILING

TO:

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PLEASE TAKE NOTICE that on **May 22, 2018**, the undersigned moves this Honorable Court to grant Defendant-Appellant's **APPLICATION FOR LEAVE TO APPEAL**.

Undersigned hereby certifies that one copy of the application and Notice of Filing was e-served on the Wayne County Prosecutor's Office. One copy of this Notice of Filing was served on each of the court clerk's listed above by regular mail.

Respectfully submitted,

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Attorney for Plaintiff-Appellee

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. Was Mr. Jemison denied his constitutional rights to present a defense and confront the witness against him when the trial court kept out evidence that Mr. Jemison had a prior consensual sexual relationship with the complaining witness, wrongfully relying on the rape shield statute?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. Was Mr. Jemison was denied his constitutional right to confront the witnesses against him when the prosecution's dna expert was allowed to testify via video at trial over objection?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

On appeal, Mr. Jemison raised two constitutional issues involving his right to present a defense and confront the witnesses against him.

Mr. Jemison first argued that the trial court denied him his constitutional right to present a defense and his right to confront his accuser. The complaining witness alleged that she was raped by a man in 1996 but her rape kit was not tested until 2015. Mr. Jemison was charged with Criminal Sexual Conduct against the complainant after the kit came back matching Mr. Jemison's DNA. Mr. Jemison and the complaining witness began a consensual sexual relationship four years later, a fact that the trial court **excluded** from the jury. The trial court wrongfully relied on the rape shield statute to keep this evidence out.

Secondly, Mr. Jemison argued that the trial court erred and violated his constitutional right to confront witnesses against him by allowing an expert witness to testify by video rather than in person over objection.

The Court of Appeals, in an unpublished opinion dated April 12, 2018, affirmed Mr. Jemison's convictions and sentence. (Sawyer, P.J., and Hoekstra and Murray JJ.) (Murray Concurring) (Opinion Attached as Appendix A). The court denied Mr. Jemison relief.

First, the Court of Appeals found that the probative value of this evidence was outweighed by the prejudice. *People v Jemison*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2018 (Docket No. 334024) p 3-4. The court reasoned that even though the complainant and the defendant may have had sex in 2000 that this was not probative that the complainant knew Mr. Jemison's identification in 1996. This misses the point though, because the important aspect of this evidence is that the complainant did not identify Mr. Jemison as her

rapist in 2000, would have been probative to the theory that the sex she had with Mr. Jemison only four years prior must have been consensual.

Second, the court found that using skyped testimony over objection was sufficient to meet the Confrontation Clause requirements, and that even though the trial court abused its discretion in allowing the testimony in violation of the court rule, that this was not inconsistent with “substantial justice.” *Id.* at 6-7. The court’s ruling completely undermines the holding in *Maryland v Craig*, 497 US 836 (1990) and ignores that Confrontation Clause rights should only be infringed upon in very limited circumstances and when *important* public policies are in play, not just because of the expense of flying in an expert for trial.

Mr. Jemison files this application arguing that the Court of Appeals erred in affirming his conviction and denying him relief. The Court of Appeals’ opinion is clearly erroneous and will cause material injustice. MCR 7.302 (B)(5). This Court should grant leave to appeal or other appropriate peremptory relief.

STATEMENT OF FACTS

Arthur Jemison was convicted by jury of first-degree criminal sexual conduct¹ on May 31, 2016 with the Honorable Dalton Roberson presiding. (T 5/31/16 at 7²); (See Also Judgment of Sentence). At trial, the prosecution argued that Mr. Jemison sexually assaulted Talisha Dowe in 1996, nearly 20 years before trial. The defense theory of the case was that Mr. Jemison had consensual sex with Ms. Dowe that evening.

- Before the Assault

On September 14, 1996, Ms. Dowe was working as an exotic dancer at an after-hours motorcycle club. (T 5/24/16 at 46). Ms. Dowe left the club with a man she had met that night named Delano. (T 5/24/16 at 46). She and Delano left the club to go get breakfast, but they decided to go to his cousin's house and have sex instead. (T 5/24/16 at 46-47). Delano used a condom. (T 5/24/16 at 48).

- The Assault

After she and Delano had sex, he parked his car in front of a house for thirty to forty minutes, leaving Ms. Dowe in the car with the engine running. (T 5/24/16 at 50). Delano returned, moved the car down a few houses into an alley, and then left again. (T 5/24/16 at 54-55).

An unidentified man came out of the alley and jumped inside of the car. (T 5/24/16 at 54-55). Ms. Dowe described the man as being about five foot eleven inches tall and weighing about 150 to 160 pounds. (T 5/24/16 at 54-55). He was wearing a baseball cap and had no facial hair.

¹ MCL 750.520B

² Trial transcripts are referred to by T followed by the date of trial and the page number. Sentencing transcripts are referred to by S followed by the page number. Other hearings are referred to by the date and type of hearing followed by the page number.

(T 5/24/16 at 56). He pointed a gun at Ms. Dowe and demanded money from her. (T 5/24/16 at 55-56).

The man began to drive the car and pulled the car over. (T 5/24/16 at 57). At trial, Ms. Dowe stated the assailant forced her to perform fellatio at gunpoint and then had vaginal sex with her. (T 5/24/16 at 57-58). Afterwards, the man then took Ms. Dowe's jewelry, Ms. Dowe got out of Delano's car, and then the man drove the car away. (T 5/24/16 at 63-65).

- After the Assault

Ms. Dowe walked to her friend Ebony's house. (T 5/24/16 at 67). Ms. Dowe never asked to use her phone. (T 5/24/16 at 67). Ebony had some friends over, and Ms. Dowe told the women that she had been raped. (T 5/24/16 at 67). The women did not believe Ms. Dowe which led to a fight and Ms. Dowe getting a black eye. (T 5/24/16 at 67).

Ms. Dowe left Ebony's house and went to her grandmother's house where she lived. (T 5/24/16 at 68). Ms. Dowe's grandmother told her to rinse out her mouth with peroxide and to take a shower. (T 5/24/16 at 69). Later, she called her sister to tell her what happened. (T 5/24/16 at 70). Ms. Dowe's sister convinced her to tell the police. (T 5/24/16 at 70).

Ms. Dowe eventually made a police report. (T 5/24/16 at 72). When making her statement to the police, Ms. Dowe made no mention of being forced to perform fellatio at gunpoint. (T 5/25/2016 at 109). She did not tell them about the consensual sex with Delano that evening. (T 5/25/16 at 109). Ms. Dowe also told the police she had gone right home after the assault and never mentioned going to her friend's house or getting into a fight there. (T 5/25/16 at 109). She had told police that her black eye was from the assailant striking her with a gun, which was not true. (T 5/24/16 at 114).

After making the report, Ms. Dowe went to Detroit Receiving Hospital, where someone swabbed her mouth and vagina for a rape kit. (T 5/24/2016 at 73-74). At trial, the attending physician could not remember if had completed the exam or if a nurse had done it. (T 5/24/16 at 29).

Ms. Dowe testified that she never went back to her job at the motorcycle club for fear of being accused of stealing Delano's car, though she was never asked about the car again. (T 5/24/16 at 137-38).

About four years later, in 2000, Ms. Dowe met Mr. Jemison. (T 5/24/16 at 92). Ms. Dowe's sister was dating Mr. Jemison's brother. (T 5/24/16 at 92-93). Ms. Dowe remembered Mr. Jemison being about five foot eleven inches tall and close to 300 pounds in 2000. (T 5/24/16 at 92-93). Ms. Dowe went out with Mr. Jemison and they had consensual sex in 2000, a fact that was excluded from the jury due to a prosecution's motion to preclude the evidence under MCL 750.520(j). (Motion 2/5/2016 at 4). Ms. Dowe testified that she did not recognize Mr. Jemison as being the man that had raped her. (T 5/24/16 at 94).

- Testing of the Rape Kit

At trial, there were questions about the chain of custody with regards to the rape kit. The doctor from Detroit Receiving testified that he could not say for certain that he was the one that actually collected the swabs from the rape kit. (T 5/24/16 at 29). Officers testified that the rape kit sat for three days before being retrieved by the police department and taken into storage. (T 5/24/16 at 154).

The property control officer could only testify as to the standard procedures of the department, and not his experience of checking this particular rape kit into Property Control. (T 5/24/16 at 149). Defense counsel objected to the officer testifying about standard procedures

rather than based on personal knowledge, but his objections were overruled. (T 5/25/16 at 25-40).

Ms. Dowe's rape kit was finally tested in February of 2015 by Sorenson Laboratory. (T 5/25/16 at 63 & 74-75). Michigan State Police (MSP) assisted with testing the back logged rape kits from the city of Detroit. (T 5/25/16 at 57). MSP sent out the kits to private laboratories for DNA testing. (T 5/25/16 at 57). The technical and administrative reviews of the Sorenson data were outsourced to another laboratory at Marshall University. (T 5/25/16 at 64).

The Forensic DNA analyst and author of the report from Sorenson Laboratory, Derek Cutler, testified by video at trial. (T 5/26/16 at 10). At a motion hearing before trial, counsel objected, citing that the court rules required a defendant's consent to introduce such evidence at trial and he was not consenting. (Motion 5/20/16 at 13). Judge Antonio Viviano, who presided at the motion hearing, overruled his objection. (Motion 5/20/16 at 14).

Counsel renewed his objection at trial. (T 5/26/16 at 3). Judge Roberson stated that he would not have allowed the witness to testify by video without the defense's consent but that because Judge Viviano had already ruled on this issue, he would not overrule him. (T 5/26/16 at 7-8).

As Mr. Cutler, began to testify it became clear that he had not actually seen the rape kit and was testifying based on another analyst's notes. (T 5/26/16 at 21). Counsel objected on the grounds that the witness was testifying based on facts that were not yet in evidence but his objection was overruled. (T 5/26/16 at 21).

Mr. Cutler testified that he had interpreted the DNA and was offering his conclusions about the DNA, but did not conduct the actual DNA separations himself. (T 5/26/16 at 24 & 32).

Counsel objected on the ground that he was merely “reviewing documents.” (T 5/26/16 at 24). His objection was again overruled. (T 5/26/16 at 24).

Mr. Cutler concluded that there was a major DNA profile, another DNA profile matching Ms. Dowe, and a minor contributor that was inconclusive. (T 5/26/16 at 25). He gave his opinion that when a condom is used there can still be DNA found but just a smaller amount. (T 5/26/16 at 29-30).

MSP agent Catherine Maggert testified that she reviewed the data and the analysis done by Sorenson and Marshall University. (T 5/25/16 at 64-65). Trial counsel’s repeated objection that Ms. Maggert should not be allowed to testify as an expert about facts that were not in evidence was overruled. (T 5/25/16 at 80).

Ms. Maggert testified about the findings of Sorenson lab and testified that according to the report from Sorenson, authored by Mr. Cutler, there was a mixture of DNA with at least two contributors. (T 5/25/16 at 71). There was a major donor attributable to an unknown male and suitable for comparison and a minor donor, not belonging to Ms. Dowe, which was insufficient for testing. (T 5/25/16 at 71 & 97).

Ms. Maggert testified that another analyst had taken a swab of Mr. Jemison’s cheek and generated a DNA profile for Mr. Jemison. (T 5/25/16 at 81). Counsel objected to Ms. Maggert’s testimony and argued he was not able to cross examine Ms. Maggert properly since she was relying on, and testifying about, other people’s work. (T 5/25/16 at 82-83). The trial court overruled the objection. (T 5/25/16 at 86).

Ms. Maggert put the DNA profiles from the rape kit into the Combined DNA Index System (CODIS) and testified that, according to another agent, the major sample came back as associated with the DNA of Mr. Jemison. (T 5/25/16 at 72 & 75). Ms. Maggert compared Mr.

Jemison's DNA profile with the DNA profile (of the major donor) generated by Mr. Cutler and Sorenson Laboratory, and concluded that within a reasonable degree of scientific certainty the profiles were the same. (T 5/25/16 at 87 & 91).

- **Photo Line Up**

Detective Mike Sabo contacted Ms. Dowe so that Ms. Dowe could look at a photo array. (T 5/24/16 at 87). The array included Mr. Jemison's picture. (T 5/24/16 at 87). Ms. Dowe looked at the photographs, and did not identify anyone in lineup as being her assailant. (T 5/24/16 at 87). After Ms. Dowe did not choose anyone from the lineup, Detective Sabo showed her a single picture of Mr. Jemison and asked her if she knew who he was. (T 5/24/16 at 88). Ms. Dowe told the detective, "oh, yeah, that's Artie." (T 5/26/2016 at 41). Detective Sabo then asked Ms. Dowe if she knew him, why she had not identified him in the photo array. (T 5/26/16 at 41). Ms. Dowe told the detective that she did not think he could have been her assailant. (T 5/26/16 at 41).

- **Verdict and Sentencing**

After two days of deliberation, the jury acquitted Mr. Jemison of one count of Criminal Sexual Conduct and convicted him of one count of first-degree Criminal Sexual Conduct. (T 5/31/16 at 7). Mr. Jemison's guideline range was calculated as 180 months to 450 months using the judicial guidelines. (S at 4). Judge Roberson sentenced Mr. Jemison to 22 to 40 years. (S at 30).

- I. **Mr. Jemison was denied his constitutional rights to present a defense and confront the witness against him when the trial court kept out evidence that Mr. Jemison had a prior consensual sexual relationship with the complaining witness, wrongfully relying on the rape shield statute.**

Standard of Review and Issue Preservation

This Court reviews a trial court's decision whether or not to admit evidence under the Rape Shield Statute for an abuse of discretion. *People v Hackett*, 421 Mich 338; 365 NW2d 120 (1984). An analysis of a defendant's right to present a defense is a constitutional question, and is reviewed *de novo*. *People v Kurr*, 253 Mich App 317; 654 NW2d 651 (2002).

Defense counsel objected to the exclusion of evidence of previous sexual encounters between the defendant and the complainant. (Motion 2/5/2016 at 5). Counsel argued that the evidence should be admitted because it was critical to the defense's theory of the case, which can be viewed as a practical expression of the right to present a defense. (Motion 2/5/2016 at 11-12); (*See Also* Defense Objection to People's Motion to Exclude at 3). This issue is preserved.

For preserved constitutional errors, the prosecution must show that this error was harmless beyond a reasonable doubt. *People v Anderson*, 446 Mich 392, 406; 521 NW2d 538 (1994); *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967).

Argument

Mr. Jemison was charged with two counts of first degree Criminal Sexual Conduct from an alleged rape in 1996. (Arraignment on Information 12/15/2015 at 3). All parties agreed that Mr. Jemison and the complainant had consensual sex in 2000. (Motion 2/5/2016 at 4). Yet the trial court wrongly kept out evidence of the prior consensual conduct between Mr. Jemison and the complaining witness at trial.

The evidence was both admissible under MCL 750.520j, Michigan's Rape Shield Statute, and under constitutional grounds, because it went to the heart of Mr. Jemison's ability to present a defense and to confront the witness against him at trial.

- ***The evidence was admissible under the Rape Shield Statute***

MCL 750.520j, Michigan's Rape Shield Statute states:

- (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
 - (a) Evidence of the victim's past sexual conduct with the actor
 - (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Here, evidence that Mr. Jemison and Ms. Dowe had a prior consensual sexual relationship was admissible at trial as the evidence was "evidence of the victim's past sexual conduct" with Mr. Jemison.

This Court has interpreted the phrase "past sexual conduct" to mean sexual conduct prior to the introduction of the evidence, not prior to the assault. *People v Adair*, 452 Mich 473; 550 NW2d 505 (1996).

In a case "related to sexual activity between the complainant and the defendant, the strong prohibitions on evidence of a complainant's past sexual activities... are not involved." *People v Perkins*, 424 Mich 302, 307; 379 NW2d 390 (1986). Instead, the question becomes one of the materiality of the evidence and the balance between probative value and unfair prejudice. *Id.*

Here admitting the evidence would have still been in line with what the Rape Shield Statute seeks to do, which is restricting an unlimited inquiry into the sexual history of a complainant, encouraging reporting of sexual assaults, and preventing misleading the jury or humiliating the complainant. *People v Arenda*, 416 Mich 1; 330 NW2d 814 (1982). The evidence in question was the limited sexual relationship between Mr. Jemison and Ms. Dowe, not her entire sexual history or her history with other people besides the defendant. Rape shield statutes are designed to “exclude evidence of the victim’s sexual conduct with persons *other than* the defendant” (emphasis added). *Id.* at 10.

The trial court erred by excluding the evidence and by failing to even conduct a proper balancing test. At a motion hearing, the prosecution argued the evidence was irrelevant and the court stated “I disagree with you, counsel. Your Motion to Exclude is denied...” and then after more argument on the record gave trial counsel a week to submit a written response to the prosecution’s motion. (Motion 2/5/16 at 9 & 13). On February 19, 2016, the trial court entered an order granting the prosecution’s motion without any explanation as to the basis for the court’s decision. (See 2/19/16 Order Granting Motion).

The trial court should have balanced the probative value of the prior consensual sexual conduct against any prejudicial or inflammatory nature of the evidence. Had the trial court done a proper analysis, the court would have concluded that the evidence was admissible under the statute.

This Court in *Adair* provided guidance on how to determine if evidence is admissible under the statute. *Adair*, 452 Mich at 486-87. Courts should consider the time, circumstances, and nature of the relationship between the parties. *Id.* Specifically, the Court stated, “[i]f the two did not have a personal relationship before the alleged sexual assault, then any consensual sexual

relations after the alleged sexual assault would likely be more probative than if the two had been living together in a long-term marital relationship.” *Id.*

Like the Court’s hypothetical in *Adair*, the complaining witness testified that she did not know Mr. Jemison at the time of her assault, yet when they met subsequent to her assault, and did have a sexual relationship, she still could not identify Mr. Jemison as her attacker. (T 5/24/16 at 94).

The evidence of the prior consensual sexual conduct was a key part of the defense’s theory of the case, that the sex on the date of the alleged assault was consensual. (Defense Objection to People’s Motion to Exclude at 3); (Motion 2/5/16 at 11). Evidence of the complainant’s subsequent consensual sexual relationship with Mr. Jemison was not an attempt to paint the complainant as promiscuous or humiliate the complainant. The evidence was meant to present a competent defense, and was not prejudicial, particularly considering there was no motion to exclude the consensual sexual conduct with a third party that the complainant admitted to at trial. (T 5/24/16 at 47). The evidence was admissible under the Rape Shield Statute and was improperly excluded.

- ***The evidence was admissible on constitutional grounds.***

Even if the evidence was not admissible under the Rape Shield Statute, the evidence was still admissible under constitutional grounds because Mr. Jemison had a constitutional right to present a defense and cross examine the witness against him.

The Michigan and United States Constitutions guarantee a defendant the right to confront witnesses against him or her and also guarantee a defendant the right to present a defense.

Washington v Texas, 388 US 14; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). US Const, Ams VI,

XIV; Const 1963, art 1, sec 17, 20. Presentation of evidence may be required to preserve a defendant's right to confrontation. *Hackett*, 421 Mich 338.

State evidentiary rules may not infringe on the right of a defendant to present a defense. *Chambers v Mississippi*, 410 US 284; 93 S Ct 1038; 35 L Ed 2d 297 (1973). The United States Supreme Court further refined this rule in *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998). There, an airman was court martialed for drug use and wanted to introduce polygraph evidence in his defense. A military rule of evidence prevented the introduction of the evidence. The court upheld the rule of evidence. The Court reasoned that a defendant's right to present a defense is not limitless, but may be subject to some reasonable restrictions. *Id.* However, the court also stated any rule that excludes evidence that is arbitrary, disproportionate, or that infringes on a weighty interest of the accused is unconstitutional. *Id.*

This Court acknowledged such a rule in *People v Kowalski*, 492 Mich 106; 821 NW2d 14 (2012). While analyzing a rule that allowed for the testimony of experts, the court recognized that rules sometimes "must yield to the constitutional right [to present a defense]." *Id.* at 139 (citing *Scheffer*, 523 US 303).

Exclusion of the evidence of the prior consensual sexual relationship with the complainant infringed a weighty interest. Defense counsel planned on arguing that the alleged assault was in fact consensual. (Defense Objection to People's Motion to Exclude at 3); (Motion 2/5/16 at 11). Without this very important evidence, the defense counsel was relegated to calling one witness with no connection to a defense of consent. (See T 5/25/16 at 106). Defense counsel was left to attack the chain of custody of the rape test kit and argue about the unnamed sperm donor. Since the trial court excluded this key piece of evidence there was no reason for Mr.

Jemison to testify. He may have been able to offer more to the theory of consent but a large part of what he would have been able to testify about was excluded by the trial court.

By excluding the evidence of Mr. Jemison's consensual sexual relationship with the complainant, the trial court infringed Mr. Jemison's constitutional right to present a defense and ability to confront the witness against him. This error was not harmless beyond a reasonable doubt.

II. Mr. Jemison was denied his constitutional right to confront the witnesses against him when the prosecution's DNA expert was allowed to testify via video at trial over objection.

Standard of Review and Issue Preservation

A violation of the Confrontation Clause is a constitutional question that is reviewed *de novo*. *People v Beton*, 294 Mich App 191; 817 NW2d 599 (2011).

At a pretrial motion to allow expert testimony via video, defense counsel objected to any witnesses testifying by video, appropriately noting that Mr. Jemison had a right to have all witnesses appear in court, which is a practical expression of Mr. Jemison's constitutional confrontation right. (Motion 5/20/2016 at 13). At trial, defense counsel renewed his objection to the video testimony, specifically citing Michigan Court Rule 6.006(C). (Trial 5/26/2016 at 3-8).

Argument

The trial court violated Mr. Jemison's constitutional confrontation right by allowing expert testimony via video over the objection of the defense counsel. The Sixth Amendment requires that "the accused shall enjoy the right... to be confronted with the witnesses against him." US Const, Am VI. This right applies to the states via the Fourteenth Amendment. *Pointer v Texas*, 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965). This Court interpreted the Confrontation Clause in the Michigan Constitution similarly to the Sixth Amendment jurisprudence prior to incorporation. *People v Saccoia*, 268 Mich 132, 135; 255 NW 738 (1934).

The United States Supreme Court has interpreted the Confrontation right to guarantee "a face-to-face meeting with witnesses appearing before the trier of fact." *Maryland v Craig*, 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990) (citing *Coy v Iowa*, 487 US 1012; 108 S Ct 2798; 101 L Ed 2d 857 (1988)). The Confrontation right is not absolute, but may only be avoided

when necessary to “promote an important public policy and only where the reliability of the testimony is otherwise assured.” *Id.* at 850.

The Michigan Court Rules also contain language allowing video testimony in some cases. MCR 6.006(C), reads in relevant part:

(C) Defendant in the Courtroom - Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use videoconferencing technology to take testimony from a person at another location in the following proceedings:

(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;

(2) with the consent of the parties, trials. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

While this rule allows a party to waive its right to confront witnesses in person and consent to the use of videoconferencing technology for trials, it does not require a party to consent nor require the party to give a reason for non-consent.

In the case before the Court, defense counsel objected to the use of video for any witness, especially expert witnesses. (Motion 5/20/2016 at 13). Defense counsel correctly argued that Mr. Jemison had a right to have all witnesses appear in court. (*Id.*). Despite this, the trial court granted the prosecution motion to allow certain witnesses to testify by video conferencing technology over the defense objection. (*Id.* at 14).

At trial, and before the video testimony was taken, defense counsel renewed his objection. (Trial 5/26/2016 at 3). Judge Roberson, who presided at trial, but had not presided over the pretrial motion allowing for the video testimony, stated he would not overrule the

previously entered order allowing the video testimony. (*Id.* at 7). Judge Roberson stated, “If I was deciding this, I would not let the testimony in...” (*Id.* at 8). The trial court appropriately read MCR 6.006 to preclude video testimony when all parties do not consent, but indicated he would not overrule the previous order.

Allowing the key prosecution witness to testify via video, over objection, violated Mr. Jemison’s right to confront the witnesses against him. Such a violation of the confrontation right would only be allowed if it were necessary to promote important public policy *and* when the testimony’s reliability was assured. *Craig*, 497 US 836. Here, the court made no such finding that the testimony was necessary for some public policy, nor did the court find that there were other assurances as to the reliability of the testimony. There is no important public policy present to justify the video testimony. Something as trivial as money for travel or scheduling issues would not be an important public policy reason.

Additionally, there were no other assurances as to the testimony’s reliability. The expert was testifying about separations done by other scientists who worked on the same team. The DNA sample in question had been taken nearly 20 years before and there were questions about the chain, custody, and storage of the sample.

Additionally, the sample was a mixture which can cause further questions about the sample. One of the most problematic areas of forensic interpretation involves how to deconvolve, or pick apart, a stain containing the DNA of more than one person.” Faigman et al, 4 *Mod Sci Evidence* § 31:12 (2011). A chief scientist at a forensic laboratory has been quoted as saying, “If you show 10 colleagues a mixture, you will probably end up with 10 different answers.” Dolan, Felch, *The peril of DNA: It’s not perfect*, LA Times, Dec 26, 2008. Empirical data from a recent study has shown contextual bias in the interpretation of DNA mixtures. Dror,

Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 Science and Justice 204-208 (2011). Not only did 17 expert DNA examiners inconsistently interpret the data regarding a DNA mixture, the majority of experts who examined the data without contextual information about the criminal case reached a different and conflicting opinion from experts who had context information. *Id.* at 205. This creates more of a concern of the reliability of the testimony proffered at trial, and should have created an immediate bar against remote testimony technology.

The trial court erred in allowing the prosecution witness to testify by video over objection. The video testimony infringed Mr. Jemison's confrontation right. Defense counsel preserved this with an objection based on Mr. Jemison's right to face witnesses against him. (Mot. 5/20/16 at 13). This requires the beneficiary of the error, the prosecution, here, to show this error was harmless beyond a reasonable doubt which they cannot do. *Anderson*, 446 Mich at 405. Mr. Jemison's Confrontation right was violated when the trial court allowed the video testimony over the defense's objections.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant leave to appeal or other peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Kristin LaVoy

BY: _____

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